No. 89-941 (2)

Supreme Court, U.S.
FILED
JAN 10 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

WESTCHESTER RADIOLOGICAL ASSOCIATES, P.C., *et al.*,

Petitioners,

—v.—

EMPIRE BLUE CROSS AND BLUE SHIELD, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT A. BICKS
BREED, ABBOTT & MORGAN
153 East 53rd Street
New York, New York 10022
(212) 888-0800
Counsel of Record for Respondent

Of Counsel:
ROBERT A. BICKS
HOWARD S. WOLPSON
BREED, ABBOTT & MORGAN
153 East 53rd Street
New York, New York 10022
(212) 888-0800

COUNTERSTATEMENT OF QUESTION PRESENTED

Should this Court invoke its certiorari jurisdiction to review the holding of a unanimous court of appeals, speaking *per curiam*, that Blue Cross' long-standing coverage of inpatient diagnostic radiological services under its subscriber contracts for hospital insurance does not run afoul of the Sherman Act?

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
COUNTERSTATEMENT OF THE CASE	4
A. Origins of the Present Controversy	5
B. Bases for Empire's Policy	6
C. Proceedings Below	6
REASONS FOR DENYING THE WRIT	7
1. Blue Cross' Purchase of Hospital Services, in a Cost Effective Manner, on Behalf of its Subscribers Does Not Run Afoul of the Sherman Act	7
2. This Conclusion Holds Whatever Blue Cross' Market Power May Be	9
3. This Basic Bears with Especial Force in the Regulated Context Within Which Empire Functions	10
4. Whether a Particular Hospital Official May Like or Dislike Present Arrangements with Blue Cross Likewise Should Make No Difference	12
CONCLUSION	14

TABLE OF AUTHORITIES

Cases	Page
Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982)	3 n.3
Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985)	2, 3, 11
Ball Memorial Hosp. Ins., Inc. v. Mutual Insurance, 784 F.2d 1325 (7th Cir. 1986)	9
Brillhart v. Mutual Medical Ins., Inc., 768 F.2d 196 (7th Cir. 1985)	8 n.7
Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 (1979)	8 n.7
Kartell v. Blue Shield, Inc., 749 F.2d 922 (1st Cir. 1984), *cert. denied*, 471 U.S. 1029 (1985)	3 n.3, 8 n.7
Lorain Journal Co. v. United States, 342 U.S. 143 (1951)	2
Medical Arts Pharmacy, Inc. v. Blue Cross & Blue Shield, Inc., 675 F.2d 502 (2d Cir. 1982)	8 n.7
Ocean State Physicians Health Plan v. Blue Cross, 883 F.2d 1101 (1st Cir. 1989)	8, 8 n.7, 9
Pennsylvania Dental Ass'n v. Medical Serv. Ass'n, 815 F.2d 270 (3d Cir.), *cert. denied*, 484 U.S. 851 (1987)	8 n.7
Presbyterian Hosp. v. Ingraham, 39 N.Y.2d 867, 386 N.Y.S.2d 217, 352 N.E.2d 135 (1976)	5, 13 n.12
Presbyterian Hosp. v. Ingraham, 48 A.D.2d 491, 369 N.Y.S.2d 738 (1st Dep't 1975), *aff'd*, 39 N.Y.2d 867, 386 N.Y.S.2d 217, 352 N.E.2d 135 (1976)	13 n.12
SEC v. Variable Annuity Life Ins. Co., 359 U.S. 65 (1959)	14

Page

U.S.F.L. v. N.F.L., 842 F.2d 1335 (2d Cir. 1988) 10

United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956)..... 12

Rules and Statutes

Sherman Act § 1, 15 U.S.C. § 1 (1982)..... 6

Sherman Act § 2, 15 U.S.C. § 2 (1982).....3, 6, 9, 11, 12

McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.* (1982) 14

N.Y. Ins. Law § 4308(a) (McKinney 1985).....10 n.10

N.Y. Ins. Law § 4308(b) (McKinney Supp. 1989).....10 n.10

N.Y. Ins. Law § 4308(c) (McKinney 1985).....10 n.10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-941

WESTCHESTER RADIOLOGICAL ASSOCIATES, P.C., *et al.*,

Petitioners,

—v.—

EMPIRE BLUE CROSS AND BLUE SHIELD, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

None of the reasons advanced by petitioners to justify certiorari suffices to merit review by this Court.

1. Affirming grant of summary judgment in favor of respondent Empire Blue Cross and Blue Shield, Inc. ("Empire"), the ruling of the Court of Appeals conflicts with no decision of this Court or of any court of appeals. In essence, this case arises from the fact that in order to make good on its Blue Cross service benefit hospitalization insurance, Empire purchases covered services for its subscribers from hospitals at rates prescribed by the State of New York (JA 138 n.9; JA 23, ¶ 29);[1] and this State-set rate has long included as part of each hospi-

---

1 JA _____ denotes reference to the Joint Appendix filed in the Court of Appeals. A-_____ denotes reference to the Appendix to the Petition for a Writ of Certiorari.

tal's reimbursement certain inpatient radiological services.[2] Thus, radiologists may not collect from Blue Cross subscribers directly for services Empire has already paid for on their behalf. It is this inability to "direct bill" for inpatient diagnostic radiological services that the complaint at bar challenges.

Dismissing this claim, the opinion of the District Court for the Southern District of New York, which the Court of Appeals adopted as its own, concluded that "[c]ourts have consistently rejected, in the health insurance context, the argument . . . that the antitrust laws give providers of goods and services a right to bill directly patients who are Blue Cross or Blue Shield subscribers." (A-11-12.) "Blue Cross is simply acting as a rational buyer attempting to get the best possible terms for its subscribers." (A-16 (footnote omitted).) And the " 'antitrust laws do not prohibit a buyer from bargaining for the best deal possible.' " (A-16 n.13.) Particularly so since "the Blue Cross system under attack here promotes cost containment in an area in which the government has recognized the need for cost containment," (A-16) and "is supervised by State regulators." (A-17.) Finally, "to the extent that consumer welfare is the goal of antitrust, a court should be hesitant to extend antitrust law to strike down a system that currently saves consumers about $25 million a year in radiology fees." (A-18 (footnotes omitted).) This holding presents no novel or unresolved issue of law appropriate for decision by the Court.

2. Urging to the contrary, petitioners' repeated incantation of *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), and *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), is bewildering. *Aspen Skiing* rested on a "record . . . [that] comfortably supports an inference that the monopolist made a deliberate effort to discourage its customers from doing business with its small rival." *Id.* at 610. Similarly, liability in *Lorain Journal* rested on a finding that defendant's pattern of conduct was " 'bold, relentless, and predatory.' " *Lorain Journal Co. v. United States*, *supra*, 342 U.S. at 149

---

2 As the district court explained, the "radiology services here at issue are "noninterventional (*i.e.*, nonsurgical) inpatient diagnostic and therapeutic radiological services." (A-7 n.1.)

(quoting opinion below, 92 F. Supp. 794, 796 (N.D. Ohio 1950)). These cases stand at the pole opposite to the facts acknowledged as true by petitioners: as their complaint itself avers, Empire's purpose in covering disputed radiological services under its hospitalization insurance, and as a result purchasing such services directly from hospitals, is simply to make such coverage "attractive and desirable" to its subscribers, (JA 9-17, ¶ 35), ends which the antitrust laws would promote, not prohibit. Absent, therefore, is any showing—prerequisite to violation of Sherman Act § 2—that "the challenged conduct is fairly characterized as 'exclusionary' or 'anticompetitive' . . . or 'predatory,' to use a word that scholars seem to favor." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, *supra*, 472 U.S. at 602.[3]

3. Summary judgment rested, not on disputed inferences of fact, but rather on petitioners' admissions. As the district court emphasized, "at oral argument the Radiologists' counsel admitted that" (A-15)

— there is "no evidence that Blue Cross has done anything to prevent its competitors from negotiating with hospitals to buy the same bundle of services that Blue Cross buys" (*id.*);

— there is "no evidence that Blue Cross has attempted to control agreements between the hospitals and other insurers" (*id.*);

---

3 Also a mystery is petitioners' reliance on *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982), since Empire nowhere suggests that price-fixing of medical services is immune from antitrust scrutiny. *Maricopa* involved a horizontal agreement among physicians that fixed prices for their services, a *per se* violation of the Sherman Act. The Court rejected the physicians' argument that good intentions saved an otherwise illegal arrangement. *Id.* at 351. Blue Cross' agreements with hospitals, by way of contrast, involve legitimate arrangements for the purchase of a package of services, approved by the State Superintendent of Insurance (JA 24, ¶ 33), at prices set by the State Department of Health. (JA 128, ¶ 14.) The short of the matter is that "*Maricopa* is simply not on point." *Kartell v. Blue Shield, Inc.*, 749 F.2d 922, 930 (1st Cir. 1984), *cert. denied*, 471 U.S. 1029 (1985).

— there is "no evidence that Blue Cross interferes in any way with the relationship between the radiologists and patients who are not covered by Blue Cross" (*id.*);

— there is "no evidence that Blue Cross directly tells, or even suggests to, the hospitals what to pay radiologists" (A-15-16); and

— "Blue Shield's competitors [in medical insurance] benefit from Blue Cross' policy as much as does Blue Shield—none of them pays for radiology services for patients with Blue Cross coverage. * * * * There is thus no injury to competition in the medical service insurance market." (A-21-22.)

— In sum, there is "no evidence that Blue Cross' use of its market power to extract low prices was unlawful." (A-21 (footnote omitted).)

COUNTERSTATEMENT OF THE CASE

Plaintiffs-petitioners are 58 individuals or "professional corporations, partnerships or similar organizations composed of hospital-based radiologists in active practice in the seventeen [downstate] counties" that comprise the greater New York metropolitan area. (JA 9-1-9-31.) Each plaintiff has the exclusive right to provide "radiological services to patients at a hospital . . . pursuant to an agreement with the hospital." (JA 9-4-9-5.)

Empire, the sole defendant-respondent, is a product of the 1974 consolidation of the downstate area's Blue Cross and Blue Shield plans and the 1985 merger with Blue Cross of Northeastern New York, Inc. (JA 131 n.1.)[4] Under New York law, such

4 Respondent Empire Blue Cross and Blue Shield, Inc. is a not-for-profit health service corporation organized and operating pursuant to Article 43 of the New York State Insurance Law. Empire has no parent companies and owns stock in the following subsidiaries: Access America, Inc., BCS Financial Corp., Dental Network of America, Inc., Health Information Reporting Company and Plans Liability Insurance Co. This statement is made pursuant to Rule 28.1 of the Rules of this Court.

plans do not "fall into the usual categories of regulated private enterprises or regulated public utilities. They are quasi-public corporations emburdened with public responsibilities offset by governmentally granted privileges and tax exemptions." *Presbyterian Hosp. v. Ingraham*, 39 N.Y.2d 867, 868, 386 N.Y.S.2d 217, 218, 352 N.E.2d 135 (1976). Empire today provides hospital service (or "Blue Cross") benefits coverage to more than nine million, and medical indemnity (or "Blue Shield") protection to some three million, covered persons principally situated within New York's seventeen downstate counties. (JA 130-31, ¶ 2.)[5]

A. Origins of the Present Controversy

In essence, petitioners seek to have compensation for their inpatient diagnostic services shifted from Blue Cross hospital coverage, where petitioners are paid by the hospital at which each works and where Empire's reimbursement to each hospital is set by the State of New York, to Blue Shield medical coverage, where each petitioner can directly bill each patient whatever the traffic will bear.

As New York's Superintendent of Insurance explained, the Blue Cross "hospital benefit package . . . is now subject to state regulation for the purpose of controlling hospital costs and thereby subscriber premiums." (JA 24, ¶ 33.) But the same does not go for doctors' bills "to Blue Shield subscribers,

---

5 Blue Shield's medical coverage typically pays dollar benefits equal to the physician's "usual and customary" fee. Empire's Blue Cross hospital coverage, on the other hand, provides service—rather than cash—benefits: days of hospital care in any member hospital, up to a prescribed number varying with the coverage purchased, rather than dollars. (JA 17, ¶ 12.) Since practically all hospitals in this area are members, a Blue Cross subscriber can go to whatever institution an attending physician recommends, no matter what its charges may be, and payment becomes Blue Cross' problem—not the subscriber's. (JA 138-39, ¶ 14.) Thus, in the Insurance Department's words, "[s]ervice benefit coverage makes hospital costs a prime concern for Blue Cross plans such as Empire and a prime concern of the Insurance Department." (JA 17, ¶ 13.)

[which] by way of sharp contrast, are not subject to a state program involving rigorous cost control." (JA 23-24, ¶ 32.)

B. Bases for Empire's Policy

Since Blue Cross' founding in the 1930's, its contracts with downstate New York subscribers (each approved by the Superintendent of Insurance prior to issuance) have covered inpatient diagnostic radiological services, and Blue Cross has purchased such services directly from member hospitals. This leaves radiologists in the same position as many other vendors of goods and services required by hospitals, including hospital-based professionals such as interns, resident physicians and registered nurses as well as other physicians providing, for example, pathology and certain cardiology services.

Empire has stood by its comprehensive Blue Cross hospital coverage because any cutback would mean proliferation of separate billing to Empire's Blue Shield subscribers, as well as freeing of radiologists' fees from New York's strict regulatory controls over reimbursement by Empire to hospitals. Further, to Empire's view, each hospital is better equipped to negotiate with its radiologists than would be a subscriber patient, who typically has no idea of the identity of the hospital's radiologist when admitted, who thereafter has no choice in the radiologist who happens to read his X-ray, and who most likely never knows which radiologist did so.

C. Proceedings Below

It was Empire's unwillingness to unbundle the package of hospital services it promises to its subscribers that triggered this complaint, under Sherman Act §§ 1 and 2, on which the district court (per Wood, J.) granted summary judgment in favor of Empire. (A-5-23.)[6] The Court of Appeals for the Second Cir-

---

6 Before this Court petitioners assert for the first time that "[t]his case arises out of a decision made in April 1984 by Empire" (Petition at 2). This despite the fact that, as far back as 1948, the radiologists challenged the legal basis for the Blue Cross policy at bar. At that time,

(footnote continued)

cuit affirmed *per curiam* "for the reasons stated in Judge Wood's well-reasoned opinion." (A-4.)

REASONS FOR DENYING THE WRIT

The ruling below simply applies settled antitrust doctrine, in the particular context of New York State's pervasive scheme for regulation of health insurance, to uphold Empire's long-standing coverage of inpatient diagnostic radiological services under its Blue Cross hospitalization policy. This record thus gives rise to no issue of law worthy of review by this Court.

1. Blue Cross' Purchase of Hospital Services, in a Cost Effective Manner, on Behalf of its Subscribers Does Not Run Afoul of the Sherman Act.

The court below found that "[f]or antitrust purposes Blue Cross is treated as a buyer where it pays the bill and seeks to set the amount to be charged." (A-12 n.6.) As New York State's Superintendent of Insurance concluded (JA 17, ¶ 12):

> In effect, then, Empire purchases hospital care on behalf of its subscribers.

In this context, the court's finding accords with the judgment of every court that has reviewed the operations of a Blue Cross or Shield plan and—without exception—determined that each

---

radiologists and other hospital-based physicians raised the "contention" that radiological services "are 'medical' services and may not be included in 'hospital' service furnished by hospital corporations" like Blue Cross. *See* 57 Op. Att'y Gen. 183, 184 (1948) (JA 587-88). The Attorney General of the State of New York, in response to a request for his Opinion from the Insurance Department "as to whether a hospital service corporation organized and operating in this State under Article IX-C of the Insurance Law may furnish to subscribers radiology . . . services as part of hospital service," concluded that "a hospital service plan may properly furnish to subscribers radiology . . . as a part of hospital service." (JA 588-89.)

functions as a purchaser of services on behalf of its subscribers.[7]

The court below did recognize that "here there is one more intermediary interposed between the physician and the patient, *i.e.*, the hospital." (A-13 (footnote omitted).) But it (A-14):

> is difficult to see why this fact should have any antitrust significance. . . . Although *Kartell* contains what this Court reads as a jocular reference to a sinister "third force," there is no authority whatever for the proposition that a seller has an *antitrust* remedy where a buyer insists upon buying his services through an intermediary. (Emphasis in original; footnote omitted.)[8]

In short, Blue Cross "the insurer—like any buyer of goods and services—is lawfully entitled to bargain with its providers for the best price it can get." *Ocean State Physicians Health Plan v. Blue Cross*, 883 F.2d 1101, 1111 (1st Cir. 1989).

---

7 *See, e.g., Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 214 (1979) ("[t]he Pharmacy Agreements . . . are merely arrangements for the purchase of goods and services by Blue Shield"); *Ocean State Physicians Health Plan v. Blue Cross*, 883 F.2d 1101, 1111 (1st Cir. 1989) ("for antitrust purposes, a health insurer like Blue Shield must be viewed 'as itself the purchaser of the doctors' services' "); *Pennsylvania Dental Ass'n v. Medical Serv. Ass'n*, 815 F.2d 270, 272 (3d Cir.), *cert. denied*, 484 U.S. 851 (1987) ("[t]hus, the economic effect of becoming a participating dentist is to agree to sell services to Blue Shield for its subscribers at what in many cases will be a discount"); *Medical Arts Pharmacy, Inc. v. Blue Cross & Blue Shield, Inc.*, 675 F.2d 502, 505 (2d Cir. 1982) ("Blue Cross was the purchaser of the prescribed drugs"); *Kartell v. Blue Shield, Inc.*, *supra*, 749 F.2d at 925 ("Blue Shield in essence 'buys' medical services for the account of others"); *Brillhart v. Mutual Medical Ins., Inc.*, 768 F.2d 196, 199 (7th Cir. 1985) ("[s]ince the agreement in the present case runs between an insurance company (the buyer) and individual doctors (the sellers), the arrangement is really vertical").

8 Otherwise, for one example, any auto manufacturer that chooses to purchase an assembled engine, rather than each engine component separately from its maker, could be charged under the Sherman Act. The same would also go for an aircraft producer that buys wing sections from assemblers rather than itself purchasing each of the various parts which its wing section supplier purchases and utilizes.

2. This Conclusion Holds Whatever Blue Cross' Market Power May Be.

The district court assumed that "Blue Cross has significant market power as a purchaser of hospital benefits and services." (A-18 (footnote omitted).) From this assumption the court went on to conclude that: "Even assuming that Blue Cross uses its market power to obtain favorable prices from hospitals, Blue Cross has not thereby violated Section 2 of the Sherman Act." (A-20.)

Its reasoning to such end commends itself:

> "Antitrust law rarely stops the buyer of a service from trying to determine the price or characteristics of the product that will be sold." *Kartell*, 749 F.2d at 925. "Even if the buyer has monopoly power, an antitrust court . . . will not interfere with a buyer's (nonpredatory) determination of price. . . . A legitimate buyer is entitled to use its market power to keep prices down." *Id.* at 929; *see*, *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 297 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093, 100 S. Ct. 1061 (1980) (analogous conclusion with respect to *sellers* with market power). (A-20.)

Because "[t]he antitrust laws are for the benefit of competition, not competitors," it follows that "[e]ven the largest firms may engage in hard competition, knowing that this will enlarge their market share." *Ball Memorial Hosp. Ins., Inc. v. Mutual Insurance*, 784 F.2d 1325, 1338-39 (7th Cir. 1986). "As long as Blue Cross' course of conduct was itself legitimate, the fact that some of its executives hoped to see" a larger market share "is irrelevant." *Ocean State*, *supra*, at 1113.[9] " 'Under the anti-

---

9 This disposes of what petitioners call their "smoking gun". As the district court reasoned (A-21 n.20):

> The Radiologists point to a remark by Mr. Lovett of Blue Cross, to the effect that direct billing by radiologists would imperil Blue Cross' market share (presumably by making Blue Cross coverage

(footnote continued)

trust laws,' " any buyer—regardless of its size—" 'is encouraged . . . to remain responsive to the needs and demands of its customers.' " *U.S.F.L. v. N.F.L.*, 842 F.2d 1335, 1361 (2d Cir. 1988) (affirming jury instructions *in haec verba*). Remaining responsive to such "needs"—in the complaint's words, making its coverage "attractive and desirable" to subscribers—is precisely what Blue Cross is alleged to have done.

3. This Basic Bears with Especial Force in the Regulated Context Within Which Empire Functions.

In the State of New York, the number and sorts of persons covered by Blue Cross—the bases for whatever percentage of hospital revenues, or market share, for which Blue Cross accounts—are the function of State policy as to what individuals Blue Cross must cover, plus the legislatively enacted "differential" that enables it to do so.[10] Such State role disables whatever finding of "anticompetitive" conduct or design may

---

less valuable) . . . . Whether or not Mr. Lovett is correct, this statement alone is not probative of any unlawful conduct on the part of Blue Cross. Even if this remark showed an intention on Mr. Lovett's or Blue Cross' part to limit competition, "an admitted intention to limit competition will not make illegal conduct that we know to be pro-competitive or otherwise immune from antitrust control." 7 Areeda, *supra*, ¶ 1506 at 391.

10 Specifically, New York law requires prior approval as to form and content by the Superintendent of Insurance before Blue Cross can "enter into a subscriber contract for hospital or medical coverage." (JA 14, ¶ 5.) *See* N.Y. Ins. Law § 4308(a). The same goes "for the 'schedule of the premiums or if appropriate rating formula from which premiums are determined, to be paid under the contracts.' " (JA 14, ¶ 6.) *See* N.Y. Ins. Law § 4308(b). Indeed, prior to "any proposed community rate increase for hospital and medical coverage," the law requires a public hearing. (JA 14, ¶ 7.) *See* N.Y. Ins. Law § 4308(c). As the New York State Council on Health Care Financing put it in its April 1987 Report (at 3):

> New York State in terms of health care has been the most highly regulated state in the nation. (JA 13, ¶ 3 (footnote omitted).)

be required to make out monopolization under Sherman Act § 2. *See, Aspen Skiing Co. v. Aspen Highlands Skiing Corp., supra*, 472 U.S. at 602.

It is the State, for example, that obliges Blue Cross to cover—at the same community rate, without prior physical examination, and at a substantial underwriting loss—large population segments such as individuals, small groups and the elderly (JA 19 n.4; JA 18, ¶ 16), persons that other insurers shun. (JA 18, ¶ 15.) Blue Cross is further obliged by the State to subsidize coverage of such persons out of its revenues from experience-rated group business for which it competes with other insurers. (JA 21-22, ¶¶ 24, 25.)

However, Blue Cross coverage of those without otherwise adequate insurance, as well as of experience-rated groups, is enabled only by the legislatively decreed "differential" which allows Blue Cross to purchase hospital services on behalf of all its subscribers at rates lower than commercial insurers. (JA 20, ¶ 22.) As the Superintendent of Insurance put it:

> Under the current system, Blue Cross/Blue Shield Plans are enrolling a substantial number of persons who are unable or least able to obtain health insurance coverage. The Blue Cross/Blue Shield Plans are able to do this because of the current hospital discount. (JA 20, ¶ 22.) (Emphasis omitted.)

From this it follows that it is State action and State policy—not anticompetitive or exclusionary design on the part of Blue Cross—that account for Blue Cross' present market posture.

In any event, it is the State that prescribes the price which Blue Cross pays for services at each member hospital. Thus, after reviewing the history of the present system for State regulation of Blue Cross' reimbursement, the State Department of Health concluded (JA 128, ¶ 14):

> ***This means that Blue Cross can pay hospitals neither more nor less than the rate established by state law, as determined by the Department. As a practical matter, then, Blue Cross can neither bargain for a lesser rate nor pay a higher rate than the state approved rate of payment.*** **(Emphasis added.)**

Such State control over price is key. For market share, the strength of existing and potential competitors, as well as the nature of the consuming buyers, are all relevant under Sherman Act § 2 to but a single end—to determine whether a firm possesses power over price in the relevant market. Indeed, "[m]onopoly power is the power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956) (footnote omitted). Since "[i]t is inconceivable that price could be controlled without power over competition" (*id.* at 392), inquiry under Sherman Act § 2 begins and ends with the State's control over price in the relevant market—the payment of monies to hospitals for patient care.

4. Whether a Particular Hospital Official May Like or Dislike Present Arrangements with Blue Cross Likewise Should Make No Difference.

Whether a given hospital might make more or less money under a different arrangement with Blue Cross ought make no difference because each member hospital has long ago agreed to accept State-set reimbursement from Blue Cross as payment in full for hospital services rendered patients covered by Blue Cross. Despite petitioners' efforts to generate confusion as to hospitals' obligations to Blue Cross or Blue Cross' obligations to its subscribers,[11] all parties have long and well understood

---

11 For example, petitioners point to Empire's arrangement covering New York State employees and their dependents (Petition at 7-8) to suggest some confusion on this score. Just to the contrary, however, the Empire Officer responsible for "all facets of claims processing, marketing, advertising and customer service for" that account has made clear below that

> [t]he Master Group Contract itself, a copy of which is *not* attached to Plaintiffs' [papers] . . . specifically provides that "Hospital Service shall comprise and mean . . . X-ray examinations, therapy and radioactive isotopes." (Article V, Par. 2(j)). . . .
>
> [T]he two parties to Blue Cross' hospital insurance subscriber agreement for New York State government employees . . . have both consistently interpreted their agreement as *including* professional non-interventional inpatient diagnostic and therapeutic

(footnote continued)

their respective obligations. These cannot now be held illegal and thus avoided simply because a hospital administrator now believes some other arrangement might leave his hospital better off financially.[12]

Particularly so since Blue Cross' relations with almost two-thirds of the member hospitals the complaint mentions have endured for almost half a century, and with practically all of them for three decades or more. The State of New York has stated its interest in preserving Blue Cross' comprehensive benefit coverage which such hospital arrangements have enabled. In the words of New York's Superintendent of Insurance (JA 23-24, ¶¶ 31-33):

> One consumer benefit of this policy has been that payments by subscribers for inpatient radiological diagnostic services have been kept under state regulation. Such policy is thus consistent with a major regulatory goal of this state to hold down increasing costs of inpatient care.
>
> * * *
>
> [Further,] [i]f direct billing by radiologists is permitted where, as here, such services have been included in hospital coverage, it could result in the unbundling of an inpatient hospital benefit package which is now subject to state

---

radiological services as a covered hospital service in Downstate New York. (JA 716-17.)

12 This argument harks back to the bases for enactment of New York's rigorous program for control over hospital costs:

> [t]he Legislature found that hospital costs were rising at an alarming rate and were attributable in large part to continued pressure for unnecessary duplication of facilities and inefficient management.

Presbyterian Hosp. v. Ingraham, 48 A.D.2d 491, 492, 369 N.Y.S.2d 738, 739 (1st Dep't 1975), *aff'd*, 39 N.Y.2d 867, 386 N.Y.S.2d 217, 352 N.E.2d 135 (1976) (citation omitted).

In the words of New York's Court of Appeals, the upshot was:

> ballooning hospital costs spawned only in part by inflation but mostly by hospital excesses in a reimbursed non-profit setting. . . .

Presbyterian Hosp. v. Ingraham, 39 N.Y.2d 867, 869, 386 N.Y.S.2d 217, 218, 352 N.E.2d 135, 136 (1976).

> regulation for the purpose of controlling hospital costs and thereby subscriber premiums.[13]

The views of such State officers appear worthy of consideration. Since the McCarran-Ferguson Act (15 U.S.C. § 1011 *et seq.*) leaves regulation of the "business of insurance" to the several states, courts

> start with a reluctance to disturb the state regulatory schemes that are in actual effect, either by displacing them or by superimposing federal requirements on transactions that are tailored to meet state requirements. When the States speak in the field of "insurance," they speak with the authority of a long tradition.

SEC v. Variable Annuity Life Ins. Co., 359 U.S. 65, 68-69 (1959).

CONCLUSION

The petition for a writ of certiorari should be denied.

January 10, 1990

Respectfully submitted,

Robert A. Bicks
Counsel of Record
Howard S. Wolfson
BREED, ABBOTT & MORGAN
153 East 53rd Street
New York, New York 10022
(212) 888-0800

Attorneys for Respondent

---

13 The New York State Department of Health has similarly concluded that "such inclusion effectuates the State goal of cost containment" (JA 129, ¶ 17).